IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

Nos. 826, 827, 828

RALPH E. TAYLOR, *Appellant,*

v.

STATE OF MISSISSIPPI, *Appellee.*

CLEM CUMMINGS, *Appellant,*

v.

THE STATE OF MISSISSIPPI, *Appellee.*

BETTY BENOIT, *Appellant,*

v.

THE STATE OF MISSISSIPPI, *Appellee.*

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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Why the American Civil Liberties Union Files this Brief

The American Civil Liberties Union is a non-partisan, non-sectarian organization, national in scope, with members in the State of Mississippi. Its purpose is to defend

the fundamental liberties guaranteed by the Bill of Rights to all Americans, regardless of creed, class or color.

Most persuasive, we think, is the language used by the Court of Appeals of New York, in *People* v. *Barber* (1943), 289 N. Y. 378, 386, a case involving also, as does this at bar, members of that small minority known as Jehovah's Witnesses:

> "It may seem to some that appellant's activities were of such a character that, at this critical period in world history, the Courts and the Bar need not be particularly concerned with their repression. But, if appellant's activities involved the exercise by him of fundamental rights guaranteed by the Federal and State Constitutions, the violation of those rights cannot be disregarded as of trivial consequence. Each case of denial of rights to an individual or to a small minority may seem to be relatively unimportant, but we know now, more surely than ever before, that callousness to the rights of individuals and minorities leads to barbarism and the destruction of the essential values of civilized life".

We believe that unwarranted violation has here been done not only to the principle that "our democratic form of government functioning under the historic Bill of Rights has a high responsibility to accommodate itself to the religious views of minorities however unpopular and unorthodox those views may be" (dissenting opinion, *Jones* v. *City of Opelika,* 316 U. S. 584, 623), but also to the principle that "we do not lose our right to condemn either measures or men because the country is at war." (*Frohwerk* v. *United States,* 249 U. S. 204, 208.)

Hence the submission of this brief *amicus curiae.*

The Statute and Charges Here Involved

The convictions in all three of these cases are based on the same statute, Chapter 178, Mississippi Laws of 1942, page 211, set forth in the dissenting opinion of Judge Anderson* (R. 178).

In all three cases, also, the offenses are identical, in that in each the allegedly criminal propaganda was characterized as (R. 7),

> "designed and calculated to encourage disloyalty to the government of the United States of America and the State of Mississippi and reasonably tending to create an attitude of stubborn refusal to salute, honor, and respect the flag and government of the United States of America * * *",

with additional specific words by the Taylors, not charged against the others, to the effect that the Taylors also said "It is wrong for the President to send the army across for they are just being shot down for nothing".

Hence, the same statute, and except as just noted, the same charges being common to all the convictions, conciseness may be served by discussing all the questions involved in one brief rather than in three.

The Issues

So as to aid easily to grasp the issues here involved, we set forth in full the section of the statute under which all the convictions here were obtained:

> "SECTION 1. Be it enacted by the Legislature of the State of Mississippi, That any person who individually, or as a member of any organization,

* All "R" (Record) references are to the Taylor record only.

> association, or otherwise, shall intentionally preach, teach, or disseminate any teachings, creed, theory, or set of alleged principles, orally, or by means of a phonograph or other contrivance of any kind or nature, or by any other means or method, or by the distribution of any sort of literature, or written or printed matter, designed and calculated to encourage violence, sabotage, or disloyalty to the government of the United States, or the State of Mississippi, or who by action or speech, advocates the cause of the enemies of the United States, or who gives information as to the military operations, or plants of defense or military secrets of the nation or this State, by speech, letter, map or picture which would incite any sort of racial distrust, disorder, prejudices or hatreds, or which reasonably tends to create an attitude of stubborn refusal to salute, honor or respect the flag or government of the United States, or of the State of Mississippi, shall be guilty of a felony and punished by imprisonment in the state penitentiary until treaty of peace be declared by the United States but such imprisonment shall not exceed ten years".

We raise no issue with the one small clause of the above statute which forbids the specific, and clearly reprehensible *act* of giving "information as to the military operations • • • of the nation or of this State • • •".

Any question here as to this one specific clause is academic in any event as none of the indictments here in question makes any allegation charging the giving of "information as to military operations".

Thus, granting in full the verity of the allegations of the three indictments at bar drawn under this statute, the question that forces itself to the fore is whether a statute as egregiously repressive as this, loosely and amorphously worded as it is, ought to be allowed to stand.

More specifically, perhaps, the issues, from the civil liberties point of view, that most profitably would serve to peg discussion, are:

1. Does not this statute, in the sweeping generalties of its repressions, as here applied, go further than any other enactment which this Court has ever permitted to stand?

2. Is not this statute so loose and vague in its wording as to render it an unpredictable and enveloping "dragnet which may enmesh anyone who agitates for a change" of policy in wartime. Herndon *v.* Lowry, 301 U. S. 242? (Even the affirming opinion below conceded that in peace-time this statute would be "unconstitutional", R. 145.)

3. Has not this statute, repressive, loose and vague as it is, when applied as it has been to these appellants at bar, unjustifiably violated freedom of speech and press, and freedom of religious conscience?

POINT I

There can be found no case decided by this Court "where an expression of personal opinion, short of the advocacy of disobedience to existing law or of the violent overthrow of our Government, has been the basis of a successful prosecution." (See dissenting opinion below R. 171)

We shall, in our discussion, use the term "repression" not as a characterization of opprobrium, but simply as a convenient designation of the right that this Court has held the State may take unto itself to

> "punish those who abuse this freedom (of speech) by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace or endanger the foundations of organized government and threaten its overthrow by unlawful means • • •". (*Whitney* v. *California*, 274 U. S. 357, 371, or *Gitlow* v. *New York*, 268 U. S. 652, 667.)

Of course, content though we are on these appeals, and for these appeals only, to consider this statement of the law as a foreclosed issue, it still remains true that the question is ever one "of proximity and degree" (*Schenck* v. *United States*, 249 U. S. 47, 52).

But it is because we think that we can show that these convictions are based on a "degree" of repression far beyond that ever allowed by this Court, that we have no hesitation in adopting as a premise of discussion for these appeals only, the rule expounded by the majority opinions in the *Gitlow* and *Whitney* cases—and this despite the vigorous dissents in each of these cases by Justices Holmes and Brandeis.

And this despite the fact again, that the rule abstractly stated as above has time and again, in its application, been vigorously questioned by unweakening dissent in this very Court (*Abrams* v. *United States*, 250 U. S. 616; *Milwaukee Publishers Association* v. *Burleson*, 255 U. S. 407; *Burns* v. *United States*, 274 U. S. 328; *United States* v. *Schwimmer*, 279 U. S. 644; *United States* v. *Macintosh*, 283 U. S. 589), and despite the fact that time and again, the rule, by indeed the majority of this Court, has been refused application at all (*e.g. Fiske* v. *Kansas*, 274 U. S. 380; *Stromberg* v. *California*, 283 U. S. 359; *DeJonge* v. *Oregon*, 299 U. S. 353; *Herndon* v. *Lowry*, 301 U. S. 342; *Bridges* v. *California*, 314 U. S. 52).

We do not wish to be understood as approving either the conclusion or the reasoning sustaining them reached by this Court in the *Abrams, Burns, Gitlow, Macintosh, Milwaukee Publishers Association, Schwimmer,* and *Whitney* cases, cited above. We are merely arguing that bad as those cases may be from the point of view we take for the protection of civil liberties, the Mississippi Statute here goes far beyond what even those cases held to be justifiable repression of or penalty for the holding of beliefs or the communication of ideas.

It is because, therefore, it is ever a "question of proximity and degree", and because we agree that "it is useless to define free speech by talk about rights" (*Chafee, Freedom of Speech in War Time,* 32 Har. L. R. 932, 957), that we propose, by inductive examination of this Court's holdings relied on by the affirming opinion below, to show that the degree of repression here urged by the State of Mississippi goes well beyond anything ever allowed by this Court before, and ought therefore to be thrown back.

A. This Court's holdings in the syndicalism cases do not justify the degree of repression enacted by the statute here in question.

That in the discussion of these appeals, we are in a realm of conflicting social policies where citations of authority, even less hiddenly than usual, are rationalizations supporting choice, rather than reasons determining "where choice shall fall", is hardly open to penetrating debate (*Cardozo, Nature of the Judicial Process,* p. 12).

Nevertheless it remains of value to show by a case—by—case scrutiny, that even the holdings of this Court, summoned by the Court below to justify its conclusion, fall short of buttressing the statute here in question or these convictions obtained under them.

Thus, *Fox* v. *Washington*, 236 U. S. 273, the very first decision of this Court cited by the affirming opinion below, while itself not a case involving a syndicalism statute, nevertheless is a case which vividly illumines one of the chief differences between the statute at bar and the syndicalism statute cases relied on in the affirming opinion below.

For in the *Washington* case, the statute under consideration was a specifically worded one, penalizing "a tendency to encourage or incite the commission of any crime, breach of the peace or act of violence", which was read by this Court "as confined to encouraging an actual breach of the law" (236 U. S. p. 277).

How different this *Washington* statute, therefore unwhipped by this Court, from the statute at bar which penalizes propaganda "designed and calculated"—not to punish "an overt breach and technically criminal act" (236 U. S. p. 277)—but to punish the large, undefinable and amorphous conduct of encouraging "disloyalty to the government of the United States", or "the cause of the enemies of the United States. * * *"

To understand but one of the reasons why the *Washington* statute—and the syndicalism statutes—could be permitted to stand, while this at bar must be stricken down, it is but necessary to hark back to the words of this Court in *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, speaking of a similarly vaguely worded statute (p. 89):

> "Observe that the section forbids no definite or specific act".

And what is the "definite or specific act" interdicted by the statute here in question?

Preaching "disloyalty", or advocating "the cause of the enemies of the United States"?

Who will define "disloyalty"—or "the cause of the enemies of the United States"? Any jury of twelve—guided by the notions of any court or prosecutor to what is "disloyal" and what is not?

Is it "disloyal" to have condemned cooperation with Darlan—or to denounce having any truck with Franco—or for that matter, to decry a war which allies us with the "godless" state of Russia, or with an England allegedly still rampantly imperialist?

And is it advocating "the cause of the enemies of the United States "to cry aloud that our anti-submarine campaign is being bungled, or that we ought to open a "real" second front now—or that we ought to make peace now before communism takes over all of Europe—or to advocate any one or more of dozens of conflicting policies, all raging at the moment, and all of which bear directly on government policy and prosecution of the war?

To sympathize with Rabbi Ben Ezra in his plaint.

> "Now who shall arbitrate,
> Ten men love what I hate,
> Shun what I follow, slight what I receive;
> Ten who in ears and eyes,
> Match me: We all surmise;
> They this thing, and I that;
> Whom shall my soul believe" • • •

is not to abandon all hope of any reasonably objective standard of ascertainable guilt (see *Schenck* v. *United States,* 249 U. S. 47).

But certainly a statute which attempts to do no less than punish "disloyalty" without defining it, or punish advocacy of "the cause of the enemies of the United

States" without delineating it, is a statute so amorphous, so unrestrictive, and so enveloping that, just as said by this Court in *Herndon* v. *Lowry*, 301 U. S. 242, 263, it is a statute which "amounts merely to a dragnet which may enmesh anyone who agitates for a change" of war policy.

The statute in question here ought, therefore, to be stricken down (see dissenting opinion below of Judge Anderson, R. 171), *United States* v. *Rees*, 92 U. S. 214, 221; *Stromberg* v. *California*, 283 U. S. 359; *Lanzetta* v. *State*, 306 U. S. 451).

The next two opinions of this Court relied on by Judge Roberds below, *Whitney* v. *California*, 274 U. S. 357, and *Burns* v. *United States*, 274 U. S. 328, fall short just as does the *Fox* case, *supra*, in justifying the repression here attempted.

For in both the *Witney* and *Burns* cases, this Court dealt with cases involving the so-called criminal syndicalism statutes forbidding advocacy of sabotage necessitating violent overthrow of industry or government.

Moreover in the *Whitney* case the evidence further showed (274 U. S. p. 379) "the existence of a conspiracy on the part of members of the International Workers of the World to commit *present serious crimes*", while the *Burns* case, furthermore, went off on a procedural point (274 U. S. p. 337).

And in any event, both cases were dealing with the one statute the "language" of which was "clear; the definition of 'criminal syndicalism' specific" (see 274 U. S. at p. 368).

And this Court, at the very same (May, 1927) term in which it decided the *Whitney* and *Burns* cases, *supra*, in *Fiske* v. *Kansas*, 274 U. S. 380, in considering a con-

viction obtained under the self-same kind of syndicalism statute as was under scrutiny in the previous two cases, reversed the *Fiske* conviction on the ground that while the statute perhaps was clear enough in its language, there was no showing in that case of propaganda "advocating the overthrow of the existing industrial or political conditions by force, violence or unlawful means" (see 274 U. S. at p. 386).

What then shall be said of the statute and convictions at bar, where not merely is the statute itself so loose in its wording as to constitute an enveloping "dragnet", but the evidence grounding the convictions reveals not even a scintilla of proof of the advocacy of the change of anything "by force, violence or unlawful means".

Another of the criminal syndicalism statute cases relied upon by the Court below is that of *Gitlow* v. *New York*, 268 U. S. 652.

But the inapplicability of the *Gitlow* case to the situation at bar is concisely pointed out by this very Court in *Herndon* v. *Lowry*, 301 U. S. 242, 256, when in distinguishing the statute under consideration in the *Herndon* case from the statute in the *Gitlow* case, this Court said:

> "There (in the Gitlow case), however, we dealt with a statute which, quite unlike * * * (this one at bar), denounced as criminal acts carefully and adequately described".
>
> (Parenthetical inserts ours.)

Thus, the clear distinction between the syndicalism cases and the situations at bar is twofold:

First going no further than the faces of the statutes themselves—we have here a statute denouncing, as criminal, opprobrious vagueness as "disloyalty" and "cause of the enemies of the United States", as against the syn-

dicalism statutes which denounce as criminal "acts carefully and adequately described" (*Herndon* v. *Lowry*, 301 U. S. 242, 256).

Secondly, these records at bar show no advocacy of force or violence of any kind, as against the evidence in all the syndicalism cases of advocacy of change by force and violence—with conviction reversed as soon as the evidence fell short of such a showing (see *Fiske* v. *Kansas*, 274 U. S. 380, quoted just above).

B. This Court's holdings in the Espionage Act cases do not justify the degree of repression enacted by the statute here in question.

The second group of cases relied on below in supporting the statute and convictions here in question, are those decided by this Court under the 1917 Espionage Act.

We find, however, upon examination, that in the actual holdings of this Court, only those provisions of the Espionage Act which interdict (R. 146) "the doing of any of the (specific) act or things enumerated in the (espionage) statute" have ever been given effect by this Court.

Hence it is that not even the consistently dissentient Mr. Justice Holmes in his dissent in *Abrams* v. *United States*, 250 U. S. 616, 627, ever saw any "reason to doubt that the questions of law that alone were before this Court in the cases of *Schenck*, *Frohwerk*, and *Debs*, 249 U. S. 47, 204, 211, were rightly decided."

For in each of these three Espionage Act cases thus enumerated by Mr. Justice Holmes there was present, even beyond the doubt of the frequently dissentient Messrs. Justices Holmes and Brandeis, "a clear and present danger" to the state in the utterances of the defend-

ants in those cases, in that in each of them "an actual obstruction of the recruiting service" was proved (*Schenck* case, 249 U. S. 47, 52).

And how far beyond the evidence in these cases at bar went the evidence in the *Abrams* case, *supra,* is manifest from the very words of the majority opinion in that case which read the utterances there as advocating "a resort to a general strike of workers in ammunition factories for the purpose of curtailing the production of ordnance and munitions necessary and essential to the prosecution of the war" (250 U. S. 616, 624).

And even from such language, taking into account the circumstances of its utterance, Messrs. Justices Holmes and Brandeis were so far from being able to apprehend "a clear and present danger" to the community as to be unable to agree with the majority in the *Abrams* case, despite their conformity with the majority in the other three (250 U. S. p. 624 ff.).

We mention this dissent in the *Abrams* case to illumine the application of the "clear and present danger" doctrine laid down by this Court in *Schenck* v. *United States,* 249 U. S. 47.

No need is there for us before this Court to expatiate upon the doctrine. We do no more than to recall that it "is a rule of reason" that "can be applied correctly only by the exercise of good judgment", which must be called upon to decide as a question of degree. "* * * whether in a particular instance the words spoken or written fall within the permissible curtailment of free speech" (*Schaefer* v. *United States,* 251 U. S. 466, at pp. 482-483).

To skip then for a moment from the Mississippi statute, which to this point we have considered in the abstract, to the evidence under which these convictions were obtained:

What does the evidence show? Some (to us) misguided zealots, not politically, but religiously inspired, who impress many persons as being repellantly fanatic, rather than reasonably induced in their convictions, and who act not in concert or conspiracy, but singly or in twos to win over civilians, and not the military, to their creed.

Is it such as these who constitute "a clear and present danger" to the stability of the state?

Woe to us and all our institutions if such as these require repression! It seems to us that if these "poor and puny" propagandists must now, because of war, be repressed, then indeed, our beloved democracy is one which even when victorious will have lost its "liberty at its own hands". (See dissenting opinion of Chief Judge Smith below, R. 177.)

For it needs but a juxtaposing of the evidence in these records at bar alongside the evidence in cases such as *Abrams* v. *United States,* 250 U. S. 616; *Schaefer* v. *United States,* 251 U. S. 466, *Gilbert* v. *Minnesota,* 254 U. S. 325; *Milwaukee Publishers Co.* v. *Burleson,* 255 U. S. 407, or any of the other Espionage Act cases decided by this Court to perceive how far the evidence adduced in any of those cases goes beyond anything adduced at bar.

However, close the question of degree may have been in any of the cases just cited, it is our considered belief that the evidence at bar is so remote from any showing of "clear and present danger", that even the majority, we think, in any of those cases just cited would have agreed in applying to the case at bar the dissenting words of Mr. Justice Brandeis in *Schaefer* v. *United States,* 251 U. S. 466, 483:

> "* * * no jury acting in calmness could reasonably say that any of the publications set forth in

> the indictment was of such a character or was made under such circumstances as to create a clear and present danger either that they would obstruct recruiting or that they would promote the success of the enemies of the United States. That they could have interfered with the military or naval forces of the United States or have caused insubordination, disloyalty, mutiny or refusal of duty in its military or naval services was not even suggested; and there was no evidence of conspiracy * * *."

Exactly so, we submit, in all three cases at bar.

C. This Court's holdings in the flag salute cases do not justify the degree of repression enacted by the statute here in question.

The third line of holdings of this Court relied on in the controlling opinion below to sustain these convictions (R. 153), is known as the flag salute cases, headed by *Gobitis* v. *School District of Minersville,* 310 U. S. 586.

We pass the point that the *Gobitis* case, by the explicit withdrawal from its support of four of the present justices of this Court, has been undermined to the point of collapse (See Chief Justice's Stone's original dissent in the *Gobitis* case, *supra,* and special dissenting opinion in *Jones* v. *City of Opelika,* 316 U. S. 584).

For we find it unnecessary here to quarrel with the holding of the *Gobitis* case* for the reason that we believe that it simply does not even touch the situations at bar.

For in the *Gobitis* case this Court was dealing with the application by the statute there of an indirect sanction—that is, of a compulsion to salute the flag as a condition of attending public school.

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* Our position on this case is well known to this Court by the filing of Briefs *amicus curiae* in the *Gobitis* case, *supra,* and in *West Virginia State Board of Education* v. *Barnette,* No. 591, This Term.

It was not the right to propagandize—the right of free speech—which was there involved. It was not forbidden to the children—or their elders—to agitate for abolition of the flag salute. They were required only as a condition of attending public school to perform a certain act—salute the flag. Neither the children nor their elders were forbidden by the statute to agitate for the abolition of the act.

Viewing it purely logically, the *Gobitis* enactment was one as though it were required of school children that they listen to the teaching of American history—or of German history—as a condition of attending school, at the same time as they or their parents were left free to agitate or petition for the elimination of the teaching in public school of American—or German—history.

Different—far different—would the *Gobitis* enactment have been if it forbade peaceful agitation seeking to eliminate the flag salute. For then, indeed, instead of the statute's enactment an indirect sanction encouraging flag saluting, we would have a direct interdiction of agitation against it.

It is one thing to encourage an act or line of conduct—it is wholly another to forbid any agitation against it.

Indeed, both these activities are simply part of "the free trade in ideas" in the open "competition of the market" which is so vital a part of democratic functioning. (*Abrams* v. *United States,* 250 U. S. 615, 630.)

What the *Gobitis* enactment did was simply to give an unfair advantage to the activity in favor of flag saluting as against the activity opposed. But it did not, as attempts the statute here in question, attempt to *wipe* out one activity as against the other.

And that the principle of the *Gobitis* case—unconstitutional as we think it is—simply does not touch that in

these situations at bar, is further proved by the fact that any number of state courts, wholly in agreement with this Court's holding in *Schenck* v. *United States*, 249 U. S. 47, have nevertheless found themselves unable to follow it in its holding in the *Gobitis* case (See *State* v. *Lefebvre* (N. H.), 20 A. (2d) 185; *Commonwealth* v. *Johnson*, 309 Mass. 476; *Kansas* v. *Smith*, 155 Kansas 588; *Bolling* v. *Superior Court* (Wash.), 133 Pac. (2d) 803; *In re Reed* (N. Y.), 262 App. Div. 858; *Commonwealth* v. *Nemchik* (unpublished) (Court of Quarter Sessions, Luzerne Co. Penna).

D. The other miscellaneous holdings of this Court relied on by the Court below do not justify the degree of repression enacted by the statute here in question.

The syndicalism cases, the Espionage Act cases, and the flag salute cases having been discussed, there remain for scrutiny a few other miscellaneous holdings of this Court which were relied on by the affirming opinion below to support the statute here in question and these convictions obtained under them.

Thus, the case of *United States* v. *Macintosh*, 283 U. S. 589, decided by a bare majority of this Court, deals simply with the right to exclude from naturalization an alien who refuses to take an unqualified oath of allegiance—and, obviously, without saying more, furnishes no support for a statute such as at bar.

And, again, *Halter* v. *Nebraska*, 205 U. S. 34, also relied on by the controlling opinion below (R. 154), is simply a case approving a statute forbidding the use of our country's flag for commercial advertising. Such a holding, again obviously, furnishes no support for a statute such as at bar.

In *Davis* v. *Beason,* 133 U. S. 333, another holding of this Court relied on in the controlling opinion below (R. 158), this Court upheld a statute which forbade doctrine that "taught and counselled • • • its devotees to commit the crimes of bigamy and polygamy".

But in the *Beason* case as in *Goldman* v. *United States,* 245 U. S. 474, still another holding of this Court relied on in the controlling opinion below (R. 159), we have two more cases which simply fall within the rule of the *Fox* case, 236 U. S. 273, discussed *supra.*

For in the *Beason* and *Goldman* cases this Court reaffirmed the rule that "an unlawful conspiracy • • • to bring about an illegal act and the doing of overt acts in furtherance of such conspiracy is in and of itself inherently and substantively a crime, punishable as such • • •". (See 245 U. S. p. 477.)

Obviously such a ruling as was thus followed in the *Beason* and *Goldman* cases can furnish no support for the convictions at bar in which there was no proof—or even allegation—of either "an unlawful conspiracy", or of any attempt "to bring about an illegal act".

We have, thus, in mentioning the *Beason* and *Goldman* cases arrived without, we think, omitting any, at the last of the holdings of this Court reported with opinion which were marshalled by the controlling opinion below in support of the statute here in question and the convictions obtained under it.

We respectfully submit that analysis of these holdings reveals each of them to fall short of justifying the degree of repression enacted by the statute here in question, and exemplified by the convictions here obtained.

POINT II

The emergency of war does not serve to validate the statute here in question.

The controlling opinion below itself conceded that (R. 145),

> "• • • if this were peace-time legislation, the writer would not hesitate to hold it unconstitutional • • •."

But, continues the controlling opinion below, because this is a statute designed "to aid in the prosecution of the present war", it is, therefore, a statute which though fatally bad in peace-time, is now, in war approved.

We pass the point that "The war power of the United States, like its other powers and like the police power of the States, is subject to applicable constitutional limitations" (*Hamilton* v. *Kentucky Distilleries*, 251 U. S. 146, 156, and see *Ex Parte Milligan*, 2 Wall. 2, 120).

For a most obvious fallacy, it is submitted, in this "war emergency" reasoning of the controlling opinion below, is demonstrable by the proposition that,

A. A statute which is "vague and indeterminate" such as is the statute here in question is necessarily violative of the due process clause of the Fourteenth Amendment, and hence, cannot stand.

The controlling opinion proceeds (R. 145) to justify the statute here in question as "an emergency, temporary war act" by quoting this Court's language in *Schenck* v. *United States*, 249 U. S. 47, 52, that "when a nation is at war, many things that might be said in time of peace

are such a hindrance to its effort that their utterance will not be endured so long as men fight * * *".

Granted.

But how can this serve to breathe constitutional life into a statute such as at bar whose first fatal infirmity is that, as said by Chief Justice Hughes for the majority in *Stromberg* v. *California*, 283 U. S. 359, it is (p. 369),

> "A statute which upon its face * * * is so vague and indefinite as to permit the punishment of the fair use of this opportunity (for free political discussion) is repugnant to the guaranty of liberty contained in the *Fourteenth Amendment.*" (Parenthetical insert and italics ours.)

For it is now beyond quibble that, as again said by Chief Justice Hughes for a united Court in *DeJonge* v. *Oregon*, 299 U. S. 353, 365:

> "Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution."

Note, thus, that a statute which in its proscription of free speech is "vague and indefinite" is a statute which not only *may* be violative of the First Amendment, but is *necessarily* violative of the Fourteenth.

Another way, perhaps, of putting it, is that a statute might conceivably properly attempt to interdict "encouraging an actual breach of the law" (*Beason* v. *Davis*, 133 U. S. 333; *Fox* v. *Washington*, 236 U. S. 273), and thus not be outlawed by the First Amendment, yet, nevertheless, might phrase its interdiction in such "vague and uncertain" language as to render it thus a "dragnet",

and thus outside the pale of, and voided by, the Fourteenth Amendment of the Constitution (*Herndon* v. *Lowry*, 301 U. S. 242, 264; *Stromberg* v. *California*, 283 U. S. 359, 369.

For as more particularly pronounced by this Court in speaking of just such a vaguely worded statute as that at bar (*Herndon* v. *Lowry*, 301 U. S. 242, 264):

> "So vague and indeterminate are the boundaries thus set to the freedom of speech and assembly that the law *necessarily* violates the guarantees of liberty embodied in the Fourteenth Amendment". (Italics ours.)

If, therefore, we are correct in our contention that the statute here in question is "vague and indeterminate" in its delineation of "the boundaries thus set to * * * freedom of speech", it becomes clear therefore that the breath of constitutional life is not given it because it was enacted as "a temporary war act", (*DeJonge* v. *Oregon*, 299 U. S. 353).

A reading of the *Schenck* case, 249 U. S. 47, reveals that it does no more than make clear that "the First Amendment to the Constitution forbidding Congress to make any law abridging the freedom of speech" will not be permitted to be perverted to protect words that "create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent". (See 249 U. S. pp. 47, 49, and 52.)

But it still remains true that any statute, whatever may be the alleged beneficences of its purposes, which, whether enacted in war or peace, is "so vague and indeterminate" as is the statute at bar, "as to permit the punishment of the fair use" of free speech, is a statute

which on its face violates the due process clause of the Constitution and must, therefore, be stricken down.

> *U. S.* v. *Cohen Grocery Co.*, 255 U. S. 81;
> *Herndon* v. *Lowry*, 301 U. S. 242, 264;
> *Stromberg* v. *California*, 283 U. S. 356, 369;
> *DeJonge* v. *Oregon*, 299 U. S. 353.

For in truth, as said by this Court unanimously in *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453:

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes".

And again, as was previously stated even more fully by this Court in *Connolly* v. *General Const. Co.*, 269 U. S. 385, 391:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law".

B. "How much democracy shall be shelved in wartime"?

It is, however, because the error in the "emergency war act" reasoning of the affirming opinion below is demonstrable on a broader ground than that just above argued, that we pose this question put by Arthur Krock

on the editorial page of the New York Times of April 6, 1943.

For given a statute which is "clear", and whose definitions are "specific", such as was under scrutiny by this Court in *Whitney* v. *California,* 274 U. S. 357, 368, and which therefore falls short of violating "the first essential of due process of law" (*Connolly* v. *General Const. Co.,* 269 U. S. 385, 391), the "question" that still remains "in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent", (*Schenck* v. *United States,* 249 U. S. 47, 52).

Addressing this question to these situations at bar "to ascertain how much democracy shall be shelved in wartime", what do we find?

We find, in all three cases, "poor and puny" itinerants, without political motivation, religiously inspired, going from family door to family door, and at most and worst, preaching it to be "idolatry" to perform the external act of saluting any flag, including our country's own, and in the case of *Taylor,* an itinerant, who, in addition, preached that "It is wrong for the President to send the army across for they are just being shot down for nothing".

Is this the stuff on which "restriction • • • is required in order to protect the State from destruction or from serious injury, political, economic or moral" (*Whitney* v. *California,* 274 U. S. 357, 373)?

Different might these situations be if these latter preachings were directed to men in uniform, or in cantonment, or barrack (*Frohwerk* v. *United States,* 249 U. S. 204).

But they were not—they were addressed only to individual civilians—so that surely these preachments fall

short of being of "sufficient weight to warrant the curtailment of liberty of expression" (*Bridges* v. *California,* 314 U. S. 252, 263).

It seems to us that whatever we may think of these defendants and their utterances, we can all agree that "no danger flowing" from such as they "can be deemed clear and present"; that "the incidence of the evil apprehended" from such as they is not "so imminent that it may befall before there is opportunity for full discussion" (*Whitney* v. *California,* 274 U. S. 357, 377).

This—apart from the vagueness of the statute, apart from the protections of the Fourteenth Amendment—this we submit, is the guide here to be invoked.

For just as was said by this Court in *Bridges* v. *California,* 314 U. S. 252, 263:

> "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."

We submit that these utterances at bar, in the circumstances of their utterance, fall far, far short of the danger line thus by this very Court marked out.

The crime if such it be of these defendants, we submit, is no worse than that "they believe more than some of us do in the teachings of the Sermon on the Mount" (See 279 U. S. at p. 655).

Few will dispute that "the great interest in free speech should be sacrificed only when the interest in public safety is really imperilled" (*Chafee, Freedom of Speech in Wartime,* 32 Harv. L. R. 932, 960.

It is our earnest belief, reviewing these convictions at bar, as objectively as we can, that the public safety is a

far cry from being "really imperilled" by the preachments and doctrines of such as these at bar.

How much democracy must be shelved in wartime?

Surely not so much as requires the suppression of such as are defendants at bar and the repression of the doctrines of non-violence that they feel called upon to preach.

POINT III

Wherefore it is respectfully submitted that these convictions at bar ought to be reversed and the indictments dismissed because,

A. The statute here in question "upon its face * * * is so vague and indefinite" as to render it an unconstitutional "dragnet" violative of the Fourteenth Amendment of the Federal Constitution (*Stromberg* v. *California*, 283 U. S. 359; *DeJonge* v. *Oregon*, 299 U. S. 353; *Herndon* v. *Lowry*, 301 U. S. 242) and further,

B. The evidence in support of these convictions at bar is so far from any showing of "clear and present danger" to the security of the state that the convictions here obtained are violative, as well, of the First Amendment of the Federal Constitution.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

Nos. 826, 827, 828.—October Term, 1942.

R. E. Taylor, Appellant, 826 *vs.* State of Mississippi. Betty Benoit, Appellant, 827 *vs.* State of Mississippi. Clem Cummings, Appellant, 828 *vs.* State of Mississippi.	Appeals from the Supreme Court of the State of Mississippi.

[June 14, 1943.]

Mr. Justice Roberts delivered the opinion of the Court.

March 20, 1942, the State of Mississippi enacted a statute[1] the title of which declares that it is intended to secure the peace and safety of the United States and of the State of Mississippi during war and to prohibit acts detrimental to public peace and safety. The first section, with which alone we are here concerned, provides:

"That any person who individually, or as a member of any organization, association, or otherwise, shall intentionally preach, teach, or disseminate any teachings, creed, theory, or set of alleged principles, orally, or by means of a phonograph or other contrivance of any kind or nature, or by any other means or method, or by the distribution of any sort of literature, or written or printed matter, designed and calculated to encourage violence, sabotage, or disloyalty to the government of the United States, or the state of Mississippi, or who by action or speech, advocates the cause of the enemies of the United States or who gives information as to the military operations, or plans of defense or military secrets of the nation or this state, by speech, letter, map or picture which would incite any sort of racial distrust, disorder, prejudices or hatreds, or which reasonably tends to create an attitude of stubborn refusal to salute, honor or respect the flag or government of the United States, or of the state of Mississippi, shall be guilty of a felony

[1] Chap. 178, General Laws of Mississippi, 1942.

and punished by imprisonment in the state penitentiary until treaty of peace be declared by the United States but such imprisonment shall not exceed ten years."

At the June 1942 term of the Madison County Circuit Court, Taylor, the appellant in No. 826, was indicted for orally disseminating teachings designed and calculated to encourage disloyalty to the government of the United States and that of the State of Mississippi; and for orally disseminating teachings and distributing literature and printed matter reasonably tending to create an attitude of stubborn refusal to salute, honor, and respect the flag and government of the United States and of the State of Mississippi, and designed and calculated to encourage disloyalty to the government of the United States.

At the June 1942 term of the Marion County Circuit Court, Betty Benoit, the appellant in No. 827, was indicted for disseminating and distributing literature and printed matter designed and calculated, and which reasonably tended to create an attitude of stubborn refusal to salute, honor, and respect the flag and government of the United States.

At the July 1942 term of the Warren County Circuit Court, Cummings, the appellant in No. 828, was indicted for distributing printed matter designed and calculated to encourage disloyalty to the United States Government and to the State of Mississippi, and tending to create an attitude of stubborn refusal to salute, honor or respect the flag or the Government of the United States and the State of Mississippi.

Demurrers and motions to quash, challenging the constitutional validity of the statute, were overruled. The defendants pleaded to the indictments and, after trial, were convicted. Each was sentenced to imprisonment in the state penitentiary for a term to expire at the end of the existing war, but not to exceed ten years. Appeals were perfected to the Supreme Court of Mississippi which, by an evenly divided court, affirmed the convictions.[2]

The appellants maintained below, and assert here, that their convictions denied them the rights guaranteed by the Fourteenth and First Amendments, in that, as construed and applied to them, the Act abridges freedom of press and of speech and is so vague, indefinite, and uncertain as to furnish no reasonably ascertainable standard of guilt.

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[2] 194 Miss. —, —, —; 11 S. 2d 663, 683, 689.

The evidence was contradictory and conflicting but the juries resolved the conflicts against the appellants. We must, therefore, examine the questions presented on the basis of the proofs submitted by the State.

In No. 826 the prosecution offered evidence to show that Taylor, in the course of interviews with several women, the sons of two of whom had been killed in battle overseas, stated that it was wrong for our President to send our boys across in uniform to fight our enemies; that it was wrong to fight our enemies; that these boys were being shot down for no purpose at all; that the two women's sons may have thought they were doing the right thing to fight our enemies, but it was wrong; that Hitler would rule but would not have to come here to rule; that the quicker people here quit bowing down and worshiping and saluting our flag and Government the sooner we would have peace. Books and pamphlets distributed by Taylor were placed in evidence. Certain statements in these books, said by the Supreme Court of Mississippi to be typical, are copied in the margin.[3]

In No. 827 it was proved that the appellant Betty Benoit distributed Volume XXIII, No. 583, of a publication entitled "Consolation", which contained a reprint of an editorial from a

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[3] "All nations of the earth today are under the influence and control of the demons. . . . All the nations suffer the same fate or come to the same end, because all nations of earth are on the wrong side, that is, on the losing side. All of such nations are against the Theocratic Government, that is, the government of kingdom of Almighty God . . . and all are under the control of the invisible host of demons, . . ."

"But to compel people to salute a flag or any other image is wrong, and particularly if that person believes on God and Christ Jesus. For the Christian to salute a flag is in direct violation of God's specific commandment."

"Almighty God commands that they must remain entirely neutral in the controversy. Because his covenant people are servants and representatives of THE THEOCRACY they must hold themselves entirely aloof from warring factions of this world."

"Non-Christians may salute the flag without reference to the foregoing rules. Those who are real conscientious Christians are in a class entirely different from others of the world. Jehovah's witnesses are Christians and in a covenant to be entirely obedient to God's law. They must teach their children and admonish them to obey God's law, as he has commanded. They are conscientious and they sincerely believe that for them to indulge in the formalism or ceremony of saluting any flag is a violation of God's specific commandment. . . ."

In its opinion the court added:

"Other passages in this literature teach that 'the so-called democracies' hold out no hope of peace, security, life or happiness—that the only place of safety is in Theocracy; that if there is a conflict between state law and what Jehovah's witnesses conceive to be Jehovah's law, the state law should not be obeyed; that Jehovah's witnesses take a pledge not to salute the flag and that to undertake by law to force a child to salute the flag is to 'frame mischief by law'."

Lewiston, Maine, newspaper commenting adversely upon the decision in *Minersville School District* v. *Gobitis*, 310 U. S. 586, and vigorously asserting that the salute of the national flag amounted to a contemptible form of primitive idol worship. The publication also contained an alleged foreign dispatch which stated that the flag salute ceremony, a daily event in French schools, originated in the Catholic schools of France; commented that the type of mind which finds satisfaction in worshiping images would also be most inclined towards various kinds of emblem worship, and added that the dispatch confirms the claim that the flag salute in the United States has been covertly pushed by the Catholic hierarchy here.

In No. 828 the State proved that the appellant Cummings distributed a book called "Children". The volume was placed in evidence. Long excerpts were read to the jury most of which seem irrelevant to the charges in the indictment. One passage, however, appears to be that on which the prosecution especially relied. It is copied in the margin.[4]

The appellants are all members of Jehovah's Witnesses. There is nothing in the records to indicate that, in making the statements and distributing the printed matter in question, they were communicating and teaching any doctrine in which they did not sincerely believe.

Section 1 of the Act defines six offenses. The indictments in Nos. 826 and 828 charge the commission of two of them[5] in a

[4] "Satan knows that his time is short, and therefore he is desperately trying to turn all persons, including the children, against God. (Revelation 12:12, 17.) Therefore Satan influences public officials and others to compel little children to indulge in idolatrous practices by bowing down to some image or thing, such as saluting flags and hailing men, and which is in direct violation of God's commandment. (Exodus 20:1-5.) That is why in the last few years rules are made and enforced in the public schools compelling children of the Jonadabs, who are in a covenant to do God's will, to indulge in the idolatrous practice of flag-saluting and hailing men. It is the influence of that subtle foe, the Devil, that has brought about this state of affairs, and now Satan's agents cause great persecution to be brought upon the parents and the children who insist on obeying the commandments of God. This makes the way of both parents and children more difficult, but at the same time it puts a test upon them and affords them the opportunity to prove their faith and obedience and to maintain their integrity towards God and his King."

[5] There is no charge in any of the indictments of (1) preaching, teaching, dissemination of teachings, or distribution of written or printed matter designed or calculated to encourage violence or sabotage; (2) advocacy, by action or speech, of the cause of the enemies of the United States; (3) the giving of information as to military affairs; (4) incitement of racial disturbances, disorder, prejudice or hatred.

single count,—(1) teaching and dissemination of printed matter designed and calculated to encourage disloyalty to the national and state governments, and (2) distribution of printed matter reasonably tending to create an attitude of subborn refusal to honor or respect the flag or Government of the United States or of the State of Mississippi. In No. 827 the single offense charged is the dissemination of literature reasonably tending to create the denounced attitude towards the flag and Government.

In *West Virginia State Board of Education* v. *Barnette,* No. 591 of the present term, the court has decided that a state may not enforce a regulation requiring children in the public schools to salute the national emblem. The statute here in question seeks to punish as a criminal one who teaches resistance to governmental compulsion to salute. If the Fourteenth Amendment bans enforcement of the school regulation, *a fortiori* it prohibits the imposition of punishment for urging and advising that, on religious grounds, citizens refrain from saluting the flag. If the state cannot constrain one to violate his conscientious religious conviction by saluting the national emblem, then certainly it cannot punish him for imparting his views on the subject to his fellows and exhorting them to accept those views.

Inasmuch as Betty Benoit was charged only with disseminating literature reasonably tending to create an attitude of stubborn refusal to salute, honor, or respect the national and state flag and government, her conviction denies her the liberty guaranteed by the Fourteenth Amendment. Her conviction and the convictions of Taylor and Cummings, for advocating and teaching refusal to salute the flag, cannot be sustained.

The last mentioned appellants were also charged with oral teachings and the dissemination of literature calculated to encourage disloyalty to the state and national governments. Their convictions on this charge must also be set aside.

The statute as construed in these cases makes it a criminal offense to communicate to others views and opinions respecting governmental policies, and prophesies concerning the future of our own and other nations. As applied to the appellants it punishes them although what they communicated is not claimed or shown to have been done with an evil or sinister purpose, to have advocated or incited subversive action against the nation

or state,[6] or to have threatened any clear and present danger to our institutions or our government.[7] What these appellants communicated were their beliefs and opinions[8] concerning domestic measures and trends in national and world affairs.

Under our decisions criminal sanctions cannot be imposed for such communication.

The judgments are reversed.

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[6] See Schenck *v.* United States, 249 U. S. 47; Abrams v. United States, 250 U. S. 616; Whitney *v.* California, 274 U. S. 357.

[7] See DeJonge *v.* Oregon, 299 U. S. 353; Herndon *v.* Lowry, 301 U. S. 242.

[8] See Stromberg *v.* California, 283 U. S. 359; Thornhill *v.* Alabama, 310 U. S. 88.